STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. SCOTT,

Plaintiff-Appellant,

v

BROOKS CORRECTIONAL FACILITY GUARD, BROOKS CORRECTIONAL FACILITY WARDEN, and BROOKS CORRECTIONAL FACILITY ASSISTANT WARDEN,

Defendants-Appellees.

UNPUBLISHED
December 28, 2001

No. 224678
Muskegon Circuit Court
LC No. 98-038864-NO

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants. We affirm in part and reverse in part.

While a prisoner at Brooks Correctional Facility in Muskegon Heights (hereinafter Brooks), plaintiff was accused of major misconduct and issued a ticket by defendant Wamser, a guard at Brooks. Plaintiff was issued the ticket for creating a disturbance after he refused to undergo a strip search in the presence of female prison guards. Plaintiff received a hearing on the charge and was found not guilty. Thereafter, plaintiff filed a complaint alleging malicious prosecution against Wamser and defendants Abramajtys and Smith, Brooks' warden and assistant warden, respectively. Abramajtys and Smith were granted summary disposition because of lack of jurisdiction, MCR 2.116(C)(4), and governmental immunity, MCR 2.116(C)(7). Later, Wamser was granted summary disposition on the ground that there was no genuine issue of material fact concerning whether Wamser lacked probable cause for issuing the ticket. MCR 2.116(C)(10).

Plaintiff first argues that the trial court erred in granting summary disposition in favor of Abramajtys under MCR 2.116(C)(4) after concluding that the trial court lacked jurisdiction over Abramajtys because he was a public official, being sued in his official capacity, and should have been sued in the Court of Claims. We disagree. We review de novo a motion for summary disposition under MCR 2.116(C)(4). *Walker v Johnson & Johnson Vision Products, Inc*, 217 Mich App 705, 708; 552 NW2d 679 (1996).

"The Court of Claims has exclusive jurisdiction to hear claims against the state and any of its instrumentalities for money damages. This jurisdiction also extends to suits against state officers where the officer was acting in an official capacity when committing the acts complained of." *Carlton v Dep't of Corrections*, 215 Mich App 490, 501; 546 NW2d 671 (1996) (internal citations omitted).[1] In this case, plaintiff sought money damages from Abramajtys for allegedly improper acts committed while he was acting in his official capacity as warden. Thus, the trial court correctly concluded that the appropriate forum was the Court of Claims and summary disposition was properly granted for Abramajtys. *Id.*

Second, plaintiff argues that the trial court erred when it failed to consider plaintiff's response to defendants' motion for summary disposition. We agree. However, we conclude that remanding this case for consideration of plaintiff's response would be futile.

The trial court stated in its May 24, 1999 order that plaintiff had not filed a response to defendants' motion for summary disposition. The record indicates that plaintiff filed a timely response on May 18, 1999. We are uncertain why the trial court did not consider this response. In any event, as we just concluded, summary disposition was properly granted in favor of Abramajtys under MCR 2.116(C)(4). For these same reasons, we also believe summary disposition was properly granted in favor of Smith under MCR 2.116(C)(4). Further, we note that the grant of summary disposition under MCR 2.116(C)(7) remains unchallenged on appeal. Additionally, plaintiff's response raised no legal argument why summary disposition was not proper. Instead, plaintiff raised and discussed other causes of action under the Fourth Amendment, the Eighth Amendment, and 42 USC 1983. Accordingly, we find no error requiring reversal.

Third, plaintiff argues that the trial court abused its discretion when it denied plaintiff's motion to amend his complaint because the trial court did not explain the reasons for denying plaintiff's motion. However, the record clearly shows that the trial court made specific findings and explained its reasons for denying plaintiff's motion. Plaintiff also argues that because he should be held to a lesser standard than an attorney, he should have been permitted to add the constitutional claims to his complaint. Plaintiff cites *Haines v Kerner*, 404 US 519; 92 S Ct 594; 30 L Ed 2d 652 (1972), for this proposition. *Haines* involved the sufficiency of a pro se

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[1] MCL 600.6419(1) confers jurisdiction on the Court of Claims and provides in pertinent part:

> Except as provided in sections 6419a and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter shall be exclusive . . . . The court has power and jurisdiction:
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> (a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.
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complaint. *Id.* at 520. In reversing the lower court's dismissal for failure to state a claim upon which relief could be granted, the *Haines* Court stated that it would hold the pleadings "to less stringent standards than formal pleadings drafted by lawyers." *Id.* Thus, *Haines* does not stand for the proposition that pro se plaintiffs should not be required to follow court rules allowing for the amendment of pleadings. Accordingly, we find no abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997)[2]

Fourth, plaintiff complains that the trial court abused its discretion when it denied plaintiff's motion for an extension of time to respond to Wamser's motion for summary disposition. We agree.

Wamser's motion for summary disposition was filed on November 29, 1999, and a hearing on the motion was scheduled for December 20, 1999. After concluding that plaintiff had not filed a response, the trial court granted summary disposition in favor of Wamser on December 27, 1999.

The record on this matter is somewhat unclear. What does emerge from the documents, however, is the picture of a continuing problem surrounding the sending and receipt of materials between the court and plaintiff, due most likely to the numerous transfers of plaintiff from correctional facility to correctional facility. Plaintiff asserts that on January 3, 2000, his motion was returned by the clerk of the court for failure to submit the required filing fee. In support of this assertion plaintiff attaches as an exhibit to his brief on appeal a letter dated January 3, 2000 from the deputy clerk of the court. This letter is not found anywhere in the lower court record and thus cannot be considered on appeal. MCR 7.210(A)(1); *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 297 n 4; 624 NW2d 212 (2001). However, the record does contain documents dated January 4, 2000, and time stamped by the court on January 6, 2000, in which plaintiff indicates that his motion was returned for failure to submit the required fees.

Thus, we conclude that the record substantiates that on or about January 4, 2000 plaintiff did receive notification from the court that his motion for an extension of time was being returned. Implicit in this finding is the fact that plaintiff must have mailed out his motion before January 4, 2000. Plaintiff indicates in his brief on appeal that he mailed his motion on December 13, 1999, after he received Warmer's motion on December 10, 1999. Plaintiff contends that he did not receive Wamser's motion until December 10, because it was sent to the wrong correctional facility. The record shows that as of October 6, 1999, plaintiff was housed in a facility in Kincheloe. As late as December 27, 1999, the court was sending mail to plaintiff at this address.[3] However, in a postscript to a December 2, 1999, memorandum from the

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[2] We also note that plaintiff cites no authority for the proposition that the trial court abused its discretion when it concluded plaintiff could not amend his complaint because of undue delay and futility. "A party may not leave it to this Court to search for authority to support its position." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 496; 593 NW2d 180 (1999).

[3] The court's December 27, 1999, opinion and order granting Wamser summary disposition was copied to plaintiff at the Kincheloe address.

Department of Corrections, it is noted that plaintiff had transferred back to Brooks.[4] Thus, we find support in the record for plaintiff's contention that Wamser's motion was late in getting to him because it was sent to the wrong address.

As for plaintiff's contention that he mailed his motion on December 13, 1999, we note that the record contains a grievance form in which plaintiff indicates that the prison refused to process his motion on December 14, 1999.[5] Setting this discrepancy aside, we do believe the record supports a finding that plaintiff did attempt to file his motion soon after receiving Wamser's motion for summary disposition. Sometime thereafter, the motion was sent to the court.

On January 12, 2000, the court denied plaintiff's motion for an extension of time. We believe that given the circumstances, the court should have granted the motion. Plaintiff has shown that his failure to timely act was the result of excusable neglect. MCR 2.108.[6]

We reverse the grant of summary disposition to Wamser but affirm it as to the other defendants. We remand for further proceedings against Wamser. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Peter M. Meter

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[4] The record also indicates that plaintiff was housed for a while at a correctional facility in Jackson.

[5] This form is attached as exhibit 2 to plaintiff's motion for reconsideration of the court's order granting Wamser summary disposition.

[6] The court noted in both its December 12, 1999, order denying plaintiff's motion for an extension of time and in the court's January 24, 2000, order denying plaintiff's motion for reconsideration, that the problems associated with getting the motion for a time extension before the court could have been avoided if plaintiff had sent a copy to the office of the judge as required by MCR 2.119(A)(2). While this is true, we find no indication in the record that the court had previously required plaintiff to comply with this court rule, or rejected any filings because of plaintiff's failure to comply.